IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. QUINTIN DESHAUN RAINES, Appellant.	No. 63303-1-I DIVISION ONE UNPUBLISHED OPINION FILED: July 19, 2010

Leach, A.C.J. — Quintin Deshaun Raines appeals his exceptional sentence for first degree burglary, contending that the trial court's bases for imposing the sentence—the particular vulnerability of the victim and the presence of the victim during the crime—were legally inadequate. The State concedes that the presence of the victim cannot support an exceptional sentence for the crime of first degree burglary, based upon assault, but asserts that the vulnerability factor alone provides a sufficient basis for the exceptional sentence. Raines contends that the jury instructions and the exceptional sentence statutory provision pertaining to the aggravating factor of particular vulnerability are unconstitutionally vague as applied to him. Because Raines did not object to these instructions or propose a clarifying instruction, he has waived

any challenge to the court's instructions. Raines's vagueness challenge to the statutory provision also fails because a person of ordinary intelligence would understand that the victim in this case, a woman in her early 70s who was at home alone, was more vulnerable to first degree burglary than a typical victim. We therefore affirm the trial court's exceptional sentence based on the particular vulnerability factor.

Background

On March 11, 2008, Wilma Boyden, an elderly woman in her early 70s, was at home alone recovering from an attack of shingles. For the past two months, her husband Robert had been taking care of her, and he had just returned to work on that day. Sometime after 10:00 a.m., the doorbell rang, and Ms. Boyden cautiously answered the door, opening it just a few inches and placing her foot behind it. A man, later identified as Raines, forced his way inside the house while pulling a nylon stocking over his face. He drew what appeared to be a gun, pointed it at Ms. Boyden, and demanded money. The two walked into the kitchen where Boyden retrieved money from her purse. During this time, Ms. Boyden told Raines that there were "other ways to get money" and that "[t]his is not the right thing to do." She also told Raines, "I think I know you," to which he replied, "Oh, no, you don't. I don't know you." Ms. Boyden then handed over the money from her purse, but Raines said that he would not take it. When Ms. Boyden asked why he would not take the money, Raines repeated that he would not accept it. Raines then ordered Ms. Boyden to disconnect the

phone, tucked the nylon stocking into his cap, withdrew the gun, and exited through the front door. According to Ms. Boyden, the entire incident lasted at least five minutes.

After Raines left, Ms. Boyden locked herself in the bathroom. She was so upset that she could not remember how to place a 911 emergency call and contacted Mr. Boyden instead. After speaking with him over her cellular phone, Ms. Boyden dialed 911. Police officers arrived soon afterward. At this point, Ms. Boyden suspected that the intruder was Raines. She explained to the officers that she had met Raines at a business exposition, where Raines had advertised his car detailing services. Believing Raines to be a "sincere, young man," Ms. Boyden wanted to "help him out" so she paid him by check to perform detailing work on her car. Some weeks later, Raines picked up the car at Ms. Boyden's house and returned the car within a few days after completing the work.[1] Ms. Boyden provided the police with her check register, which contained the name of Raines's detailing business. Later that day, Ms. Boyden identified Raines in a photographic lineup.

The officers also spoke with Mr. Boyden. At trial, Mr. Boyden testified that Raines had come to the house the day before and had inquired about a car parked down the street. Mr. Boyden suspected that Raines was "checking the place out" because he immediately left and did not ask anyone else about the car. Mr. Boyden noted that Raines wore dark coveralls. Based on this

[1] Raines did not do any further work for Ms. Boyden.

encounter, Mr. Boyden identified Raines in the photographic lineup prepared by the officers.

Raines was subsequently arrested at his place of business. He admitted to the attempted robbery of Ms. Boyden. The officers recovered various items used by Raines on the day of the incident, including the nylon stocking, black hat, pair of gloves, coveralls, and pistol, which turned out to be a loaded CO2 pellet gun.

Raines was charged with first degree burglary and first degree attempted robbery. The State amended the information to allege two aggravating factors on the burglary count: "The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance; and the current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed." At trial, the State argued that Raines chose to rob the Boydens' residence because he knew Ms. Boyden was elderly and at home alone on that day. Raines asserted a diminished capacity defense. The jury found Raines guilty as charged and returned special verdicts finding both aggravating factors present.

At sentencing, the superior court concluded there were substantial and compelling reasons to impose an exceptional sentence upward on the burglary count. In Raines's judgment and sentence order, the court marked the box next to preprinted language stating that the exceptional sentence was justified by one or both of the aggravating factors found by the jury. The court imposed an

exceptional sentence of 60.0 months for the first degree burglary count and a standard range sentence of 40.5 months for the attempted robbery count.

Analysis

Raines challenges both of the trial court's justifications for imposing an exceptional sentence. We address only Raines's challenge to the particular vulnerability aggravating factor because resolution of this issue is dispositive.

Raines contends that the jury instructions failed to define adequately the term "particularly vulnerable." Instruction 22 read,

> If you find the defendant guilty of Burglary in the First Degree as charged in Count I, then you must determine if the following aggravating circumstances exist:
>
> A. Whether the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance.
>
> B. Whether the victim of the burglary was present in the building or residence when the crime was committed.

(Emphasis added.) Instruction 24 explained, "A victim is 'particularly vulnerable' if he or she is more vulnerable to the commission of the crime than the typical victim of Burglary in the First Degree. The victim's vulnerability must also be a substantial factor in the commission of the crime."

Raines did not object to these instructions. Nor did he propose a clarifying instruction. He nonetheless contends that he may challenge these instructions for the first time on appeal because they were "vague in violation of due process." His argument ignores case law holding that "unobjected-to jury instructions are not subject to constitutional vagueness challenges on appeal."[2]

As this court explained in State v. Whitaker,[3]

> Vagueness analysis is employed to ensure that ordinary people can understand what conduct is proscribed and to protect against arbitrary enforcement of law. . . . This rationale applies to statutes and official policies, not to jury instructions. Unlike citizens who must try to conform their conduct to a vague statute, a criminal defendant who believes a jury instruction is vague has a ready remedy: proposal of a clarifying instruction.

The Whitaker court thus concluded that "[a defendant's] failure to propose a defining instruction that correctly stated the law precludes him from arguing on appeal that the absence of such an instruction was error."[4] Because Raines failed to object to the court's instructions or propose a defining instruction, he has waived his challenge to the court's instructions regarding the particular vulnerability aggravating factor.[5]

Next, Raines contends that RCW 9.94A.535(3)(b), the statutory provision establishing particular vulnerability as an exceptional sentencing factor, is

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[2] State v. Releford, 148 Wn. App. 478, 493, 200 P.3d 729 (2009).

[3] 133 Wn. App. 199, 233, 135 P.3d 923 (2006) (citation omitted).

[4] Whitaker, 133 Wn. App. at 233.

[5] We further note that jury instructional error involving the failure to define individual terms generally does not constitute an error of constitutional magnitude. "'The constitutional requirement is only that the jury be instructed as to each element of the offense charged. . . . Here the jury was so instructed. The failure of the court . . . to define further one of those elements is not within the ambit of the constitutional rule.'" State v. Scott, 110 Wn.2d 682, 689, 757 P.2d 492 (1988) (citation omitted) (quoting State v. Ng, 110 Wn.2d 32, 44, 750 P.2d 632 (1988)).

unconstitutionally vague as applied to him.[6] He claims that the undefined term "particularly vulnerable" invites an "imprecise comparative evaluation of the facts without any fixed standards of reference."

A statute is presumed to be constitutional, and the party challenging its constitutionality has the burden of proving its unconstitutionality beyond a reasonable doubt.[7] A statute is void for vagueness if it either fails to define the offense with sufficient definiteness that ordinary people can understand it or it does not provide ascertainable standards of guilt to protect against arbitrary enforcement.[8] But "[t]he fact that some terms in a statute are not defined does not mean the enactment is unconstitutionally vague."[9] Moreover, "some measure of vagueness is inherent in the use of language [so] impossible standards of specificity are not required."[10] Rather, "[a] statute is void for vagueness if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability."[11] "A vagueness challenge to a statute not involving First Amendment rights is evaluated as applied, using the facts of the particular case."[12]

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[6] RCW 9.94A.535(3) sets forth a list of aggravating circumstances to be considered by a jury that will support an exceptional sentence. That list includes whether "[t]he defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance." RCW 9.94A.535(3)(b).

[7] State v. Thorne, 129 Wn.2d 736, 769-70, 921 P.2d 514 (1996).

[8] State v. Williams, 144 Wn.2d 197, 203, 26 P.3d 890 (2001).

[9] State v. Lee, 135 Wn.2d 369, 393, 957 P.2d 741 (1998).

[10] City of Seattle v. Abercrombie, 85 Wn. App. 393, 399, 945 P.2d 1132 (1997) (citation omitted).

[11] Lee, 135 Wn.2d at 393.

[12] State v. Russell, 69 Wn. App. 237, 245, 848 P.2d 743 (1993).

According to Raines, the term "particularly vulnerable" is impermissibly vague because "an ordinary citizen could [not] reasonably conclude that, without any frame of reference, that the victim was particularly vulnerable, that is, more vulnerable than the typical victim of an assault and burglary." He insists that, because "the jury was not instructed as to the characteristics of a 'typical' burglary victim, or as to what standards apply in deciding whether the victim was particularly vulnerable," "the term is so imprecise that it carries no commonsense meaning that could consistently be applied by jurors."

We disagree. As an initial matter, we note that the void for vagueness doctrine does not generally apply to a sentencing scheme.[13] Further, the term "particular vulnerability" is not so vague that persons of common intelligence must guess at its meaning and differ as to its application. When a statute does not define terms alleged to be unconstitutionally vague, "the reviewing court may 'look to existing law, ordinary usage, and the general purpose of the statute' to determine whether 'the statute meets constitutional requirements of clarity.'"[14] In

[13] State v. Stubbs, 144 Wn. App. 644, 650, 184 P.3d 660 (2008) (citing State v. Baldwin, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003)). Raines urges us to disregard both Stubbs and Baldwin, alleging inconsistencies with Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Because we are bound by the decisions of our state Supreme Court, we decline his invitation. State v. Williams, 93 Wn. App. 340, 344, 968 P.2d 26 (1988).

[14] State v. Hunt, 75 Wn. App. 795, 801, 880 P.2d 96 (1994) (quoting Russell, 69 Wn. App. at 245).

State v. Gordon,[15] this court, in its analysis of the same term, stated that "[t]he commonsense meaning of 'particular vulnerability' reflects . . . part of its legal meaning. A jury would readily understand the concept of vulnerability." The Gordon court pointed out that "[c]ourts have . . . found that very young victims or elderly victims are particularly vulnerable."[16] Given this commonsense understanding that advanced age may render a person particularly vulnerable to crime, persons of ordinary intelligence would understand that Ms. Boyden, who was in her early 70s and at home alone, was "particularly vulnerable" to first degree burglary. The term is not unconstitutionally vague as applied to the facts in this case.

We note that the trial court checked the box next to the following preprinted language: "The grounds listed in the preceding paragraph [particular vulnerability and victim's presence in the building], taken together or considered individually, constitute sufficient cause to impose the exceptional sentence. This court would impose the same sentence if only one of the grounds listed in the

[15] 153 Wn. App. 516, 538, 223 P.3d 519 (2009). The Gordon court held, however, that "whether the vulnerability is a substantial reason for the commission of the crime does not comport with its ordinary meaning. Gordon, 153 Wn. App. at 538 n.14. Raines does not challenge this aspect of the term. In any event, the court properly instructed the jury on the substantial factor element under State v. Suleiman, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006).

[16] Gordon, 153 Wn. App. at 538 n.14. As support for this proposition, the Gordon court cited State v. Scott, 72 Wn. App. 207, 217, 866 P.2d 1258 (1993), which involved a 78-year-old woman who suffered from Alzheimer's disease. See also State v. Clinton, 48 Wn. App. 671, 676, 741 P.2d 52 (1987) (67-year-old victim); State v. Hawkins, 53 Wn. App. 598, 607, 769 P.2d 856 (1989) (75-year-old victim); State v. Hicks, 61 Wn. App. 923, 930, 812 P.2d 893 (1991) (77-year-old victim); State v. Sims, 67 Wn. App. 50, 60, 834 P.2d 78 (1992) (78-year-old victim).

preceding paragraph is valid." Because we may affirm a sentence if we find any exceptional factor valid, we need not consider Raines's challenge to the victim's presence factor.[17]

Conclusion

We hold that the court's instructions and the exceptional sentence statutory provision regarding the particular vulnerability of the victim are not unconstitutionally vague as applied to the facts of this case. The trial court's exceptional sentence is affirmed.

Leach, A.C.J.

WE CONCUR:

Spearman, J.

Cox, J.

[17] See State v. Cardenas, 129 Wn.2d 1, 12, 914 P.2d 57 (1996) ("Although we approve of only one of the three factors used by the trial court in imposing the exceptional sentence, we may uphold the exceptional sentence if we are satisfied that the trial court would have imposed the same sentence based solely upon the victim's particular vulnerability." (citing State v. Fisher, 108 Wn.2d 419, 429-30, 430 n.7, 739 P.2d 683 (1987))).